Competition Bureau Canada
Bureau de la concurrence Canada

Requests for information from private parties in proceedings under section 36 of the Competition Act

Canada

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1. Introduction

Under section 36 of the *Competition Act* (Act), private parties can commence proceedings to recover loss or damages incurred as a result of conduct contrary to Part VI of the Act or the failure of any person to comply with an order of the Competition Tribunal (Tribunal) or a court under the Act.[Footnote 1] Section 36 of the Act is intended to foster the ability of victims to recover any loss or damage they may have suffered as a result of anti-competitive conduct. The Competition Bureau (Bureau) views private actions under section 36 of the Act as an additional and important mechanism, separate and independent from its administration and enforcement of the Act. Section 36 of the Act serves not only the private interests of consumers to recover losses or damages but also the broader public interest of deterrence.

Persons contemplating, or who are parties in, proceedings under section 36 may believe that the Bureau possesses information that could be relevant to these proceedings. In this regard, the Bureau has received requests for such information, particularly from private parties involved in class proceedings in Canada. This Bulletin outlines the Bureau's general position in administering and enforcing the Act with respect to requests for access to information in the Bureau's possession or control from persons contemplating, or who are parties in, proceedings under section 36 of the Act.[Footnote 2] This Bulletin also discusses the Bureau's general basis for its position. This Bulletin supplements the "Private Actions for Damages" section of the Bureau's Information Bulletin, "Communication of Confidential Information under the *Competition Act*."[Footnote 3]

2. Bureau's general position

To protect the integrity of the Bureau's investigative process and the confidentiality of information in its possession, it is the Bureau's general position to not voluntarily provide information to persons contemplating, or who are parties to, proceedings under section 36 of the Act. As described more fully in this Bulletin, the Bureau relies heavily upon voluntarily provided information, and the Bureau's ability to administer and enforce the Act would be seriously compromised if it could not provide persons who provide such information an assurance of confidentiality over the information it obtains and the person's cooperation with the Bureau. Accordingly, if served with a subpoena, the Bureau will inform the information provider so it has knowledge of, and an opportunity to intervene. The Bureau will, if appropriate, oppose a subpoena for production of information if compliance would potentially interfere with an ongoing examination, inquiry or enforcement proceeding or otherwise adversely affect the administration or enforcement of the Act. If the Bureau's opposition is unsuccessful, it will seek protective court orders to maintain the confidentiality of the information in question.[Footnote 4][Footnote 5]

The rationale behind the Bureau's general position is to prevent interference with ongoing examinations, inquiries or enforcement proceedings and to maintain the confidentiality of information the Bureau receives pursuant to the Act, as described more fully below.

3. Preventing interference with ongoing examinations, inquiries or enforcement proceedings

The production of information in the Bureau's possession or control during an ongoing examination, inquiry or enforcement proceeding under the Act would potentially interfere with the ongoing examination, inquiry or enforcement proceeding. Accordingly, such production would adversely affect the Bureau's ability to administer and enforce the Act.

4. Importance of confidentiality for the bureau's administration and enforcemement of the act

Confidentiality is a governing principle of the Bureau's approach to the administration and enforcement of the Act. The principle of confidentiality remains important whether the request for information relates to an ongoing or closed examination, inquiry or enforcement proceedings.

The Bureau has a statutory duty to conduct its inquiries in private and to maintain the confidentiality of information it receives pursuant to the Act.[Footnote 6] In addition to its statutory obligations, the Bureau's ability to administer and enforce the Act is affected by its ability to maintain confidentiality of the information it obtains. This importance holds two dimensions:

First, the Commissioner and Bureau personnel require a substantial amount of information from a variety of sources so that examinations, inquiries and enforcement proceedings pursuant to the Act can be effectively conducted. The Bureau relies heavily on information that is voluntarily provided, which is frequently confidential, proprietary and/or commercially sensitive. The Bureau's ability to provide persons who voluntarily provide information an assurance of confidentiality under the Act encourages them to cooperate with the Bureau and provide information the Bureau requires to effectively fulfil its mandate.[Footnote 7]

In addition, whistleblowers, immunity and leniency applicants, other confidential informants and market participants are often reluctant to cooperate with Bureau investigations for fear of reprisal from the subjects of Bureau investigations and others. The Bureau's ability to properly conduct its investigations would be seriously compromised if the Bureau could not provide these persons with an assurance of confidentiality over the information it obtains and the person's cooperation with the Bureau.[Footnote 8]

Second, as noted, information provided to the Bureau is often confidential, proprietary and/or commercially sensitive. Disclosure of such information, particularly where competitors of the person(s) who provided such information can access it, undermines the enforcement of the Act and may frustrate the promotion of competition.

5. Privilege

The Bureau will rely upon applicable privileges to protect against the disclosure of information in its possession or control. For example, public interest privilege protects against the disclosure of information possessed by government where such disclosure is contrary to the public interest.[Footnote 9] Public interest privilege may apply to information collected by the Bureau during the course of an examination or inquiry, whether in enforcement proceedings under the Act or private actions under section 36 of the Act. The Bureau will assert public interest privilege where appropriate and, in doing so, must demonstrate on a case-by-case or document-by-document basis why particular records should be protected from disclosure.[Footnote 10]

6. Bureau's financial and opportunity costs

The Bureau's position is that its financial and opportunity costs arising from responding to a request for information ought to be taken into account by persons requesting information from the Bureau and by the Courts when disposing of such requests.

Information sought from the Bureau, particularly from parties in class proceedings under section 36 of the Act, is typically voluminous. Responding to such requests is often time-consuming and may require the Bureau to incur considerable costs. The costs to the Bureau are considerable in terms of the financial and human capital costs involved in responding to the request for information and relate, not only to direct costs, but opportunity costs.[Footnote 11] It can take considerable time to find, examine, classify and, if required, redact documents. Even if salary and overhead costs are repaid, the Bureau employees and counsel will not be available to carry out the Bureau's public interest mandate. This would be contrary to the public interest.

7. Conclusion

The Bureau recognizes the importance of private actions under section 36 of the Act as a tool for victims of anti-competitive conduct to recover any loss or damage they may have suffered. However, pursuant to its administration and enforcement the Act and to protect the integrity of its investigative process and the confidentiality of information in its possession, the Bureau's general position is to not voluntarily provide information to persons contemplating or who are parties to a proceeding under section 36 of the Act.

How to contact the Competition Bureau

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre.

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Footnotes

Footnote 1

Competition Act, RSC 1985, c C-34, s 36.

Return to footnote 1 referrer

Footnote 2

This bulletin is generally limited to Canadian private actions under section 36 of the Act, but may apply, in certain circumstances, to other proceedings that the Bureau is not a party to, where documents are requested from the Bureau.

Return to footnote 2 referrer

Footnote 3

Competition Bureau, "*Information Bulletin on the Communication of Confidential Information Under the* Competition Act," September 30, 2013. See, in particular, section 7.6 of the Bulletin entitled "Private Actions for Damages."

Return to footnote 3 referrer

Footnote 4

Further, persons who, pursuant to subsection 36(2) of the Act, would like a copy of the record of proceedings in any court in which a person was convicted of an offence under Part VI of the Act or convicted of or punished for failure to comply with an order of the Tribunal or another court under the Act should seek that record directly from the relevant Court.

Return to footnote 4 referrer

Footnote 5

Courts in various jurisdictions in Canada have made different conclusions arising from the specific facts before them regarding the production of information in the Bureau's possession or control. See, for example: *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2016 BCSC 97; *Imperial Oil v. Jacques*, 2014 SCC 66; *Forest Protection Ltd. v. Bayer A.G.*, [1996] N.B.J. No. 238, aff'd in part [1998] N.B.J. No. 484; *Canada (Attorney General) v. Thouin*, 2015 QCCA 2159 affirming *Thouin c. Ultramar ltée*, 2015 QCCS 1432.

Return to footnote 5 referrer

Footnote 6

Subsection 10(3) of the *Competition Act* provides that "(a)ll inquiries under this section shall be conducted in private." In practice, the Bureau extends this protection to all preliminary examinations being pursued to determine whether or not grounds exist for the commencement of an inquiry by the Commissioner. Section 29(1) of the Act reads: "(n)o person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act:

1. the identity of any person from whom information was obtained pursuant to this Act;
2. any information obtained pursuant to section 11, 15, 16 or 114;
3. whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;
4. any information obtained from a person requesting a certificate under section 102; or
5. any information provided voluntarily pursuant to this Act."

Section 29(2) of the Act reads: "(t)his section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information." The approach of the Commissioner with respect to the communication of confidential information obtained in the course of the administration or enforcement of the Act is set out in the Bureau's "*Information Bulletin on the Communication of Confidential Information Under the Competition Act*," September 30, 2013.

Return to footnote 6 referrer

Footnote 7

See *Canada (Commissioner of Competition) v Sears Canada Inc.*, 2003 CACT 19 at para 35 [Sears]; *Canada (Commissioner of Competition) v Air Canada*, 2012 CACT 21 at para 5 [Air Canada]; *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2016 BCSC 97 at para 11 [Pro-Sys]; See also *Canada (Director of Investigation and Research, Competition Act) v D & B Companies of Canada Ltd.* [1994] FCJ No 1643 at para 4-5, 51 ACWS (3d) 601 [D&B]; *Canada (Commissioner of Competition) v Chatr Wireless Inc.*, 2013 ONSC 5386 at paras 17-18 [Chatr]

Return to footnote 7 referrer

Footnote 8

Further, pursuant to section 66.1 of the *Competition Act*, any person who has reasonable grounds to believe that a person has committed or intends to commit an offence under the Act, may notify the Commissioner of the particulars of the matter and may request that his or her identity be kept confidential with respect to the notification. The Commissioner must keep confidential the identity of a person who has made such notification to the Commissioner and to whom an assurance of confidentiality has been provided by any person who performs duties or functions in the administration or enforcement of this Act. See also *Canada (Director of Investigation and Research, Competition Act) v Southam Inc.* [1991] CCTD No 16 at para 26, 38 CPR (3d) 68 [Southam]; *D&B*, *,supra note 5* at para 2-3; *Canada (Director of Investigation and Research) v Hillsdown Holdings (Canada) Ltd.* [1991] FCJ No 1021 at para 3, 29 ACWS (3d) 778 [Hillsdown]; *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2012 CACT 8 at para 6 [TREB]. See also *Chatr*, *supra* note 5 at para 17.

Return to footnote 8 referrer

Footnote 9

Chatr, *supra* note 5 at para 11; *Air Canada*, *supra* note 5 at paras 3-6; See also *Pro-Sys*, *supra* note 5 at para 11

Return to footnote 9 referrer

Footnote 10

Chatr, *supra* note 5 at para 15; *Pro-Sys*, *supra* note 5 at paras 15, 25.

Return to footnote 10 referrer

Footnote 11

Air Canada, *supra* note 5 at paras 3-6; *Pro-Sys*, *supra* note 5 at paras 11, 26.